

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
<b>PACIFIC BROADCASTING</b>	)	
<b>OF MISSOURI, LLC</b>	)	File No. BSTA-20010216ABP
	)	File No. BSTA-20010323ACD
For Special Temporary Authorization to	)	Facility ID No. 40798
Operate Station KTKY-FM, Refugio, Texas	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 14, 2004**

**Released: June 16, 2004**

By the Commission:

1. We have before us the March 13, 2003, petition for reconsideration filed by Pacific Broadcasting of Missouri, LLC (“Pacific”), licensee of broadcast station KTKY-FM, Refugio, Texas. Pacific requests reconsideration of the Commission’s February 11, 2003, *Memorandum Opinion and Order*<sup>1</sup> denying Pacific’s application for review of a staff decision denying Pacific’s request for Special Temporary Authorization (“STA”)<sup>2</sup> to operate KTKY-FM from the facilities specified in its construction permit to relocate KTKY-FM to Taft, Texas.<sup>3</sup> We also have before us: (1) the March 13, 2003, “Petition for Partial Reconsideration or, in the Alternative, Clarification” filed by Marathon Media Group, LLC (“Marathon”);<sup>4</sup> and (2) the “Joint Petition for Reconsideration and Clarification” filed by Garwood Broadcasting Company of Texas; New Ulm Broadcasting Company; and Roy E. Henderson (“Joint Petitioners”).<sup>5</sup> They request that the Commission reconsider the *Order*’s conclusion that petitioners can no longer rely on vacant “backfill” allotments to satisfy local transmission service requirements in communities from which existing service is being removed.<sup>6</sup> On June 25, 2003, Joint Petitioners filed

<sup>1</sup> *Pacific Broadcasting of Missouri, LLC*, 18 FCC Rcd 2291 (2003) (“*Order*”).

<sup>2</sup> File Nos. BSTA-20010216ABP (“February STA Request”); BSTA-20010323ACD (“March STA Request”). *See* 47 U.S.C. § 309(f).

<sup>3</sup> File No. BPH-20000613AAF.

<sup>4</sup> Petition for Partial Reconsideration or, in the Alternative, Clarification filed by Marathon Media Group, LLC on March 13, 2003 (“Marathon Petition”).

<sup>5</sup> Joint Petition for Reconsideration and Clarification filed by Garwood Broadcasting Company of Texas; New Ulm Broadcasting Company; and Roy E. Henderson on March 13, 2003 (“Joint Petitioners Petition”).

<sup>6</sup> A “backfill” allotment is one specifically made to replace an allotment that is being modified to permit a change in the city of license of an authorized station. *See, e.g., Cheboygan, Rogers City, Bear Lake, Bellaire, Rapid River, Manistique, Ludington, Walhalla and Onoway, Michigan*, 17 FCC Rcd 20491 (MB 2002).

pleadings for expedited Commission action and for a stay of further staff action.<sup>7</sup> On February 13, 2004, Marathon withdrew its petition.<sup>8</sup> On March 4, 2004, Joint Petitioners filed pleadings to update the pleadings filed for expedited Commission action and for a stay of further staff action.<sup>9</sup> On March 25, 2004, Fort Bend Broadcasting Company ("Fort Bend") filed a supplement to the record in this proceeding.<sup>10</sup> On March 26, 2004, Marathon filed pleadings to request clarification on one related issue.<sup>11</sup> For the reasons discussed below, we deny Pacific's petition for reconsideration of its Taft STA requests and deny the petition for reconsideration of our action modifying the "backfill" policy in FM allotment proceedings.<sup>12</sup> We also deny Marathon's request for clarification and dismiss as moot Fort Bend's supplement and Joint Petitioners' Joint Motion and Update to Joint Motion for expedited Commission action and for a stay of further staff action.

2. **Background.** Pacific filed a Petition for Rule Making December 23, 1998, in which it sought, *inter alia*, the substitution of Channel 293C2 for Channel 291C3 at Refugio, Texas, and reallocation of Channel 293C2 from Refugio to Taft, Texas. Pacific further sought modification of the KTKY-FM license to specify Taft as its community of license. Finally, Pacific proposed the allotment of Channel 291A at Refugio.<sup>13</sup> The Bureau issued a *Notice of Proposed Rule Making* reflecting these requests.<sup>14</sup>

3. In its comments, Pacific recognized that the Commission strongly disfavors community of license modifications that result, as would be the case here, in the removal of a community's sole local service. Pacific argued that it should be allowed to commence KTKY-FM's operations at Taft before replacement service was initiated at Refugio due to the possibility of delays in the competitive bidding process to award a new construction permit at Refugio. In the *Report and Order* granting Pacific's proposed re-allotment, the Bureau rejected Pacific's argument, noting that the Commission has

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<sup>7</sup> Joint Motion for Leave to File Joint Motion for Expedited Commission Action and Stay of Further Staff Action and Joint Motion for Expedited Commission Action and Stay of Further Staff Action filed June 25, 2003, by Garwood Broadcasting Company of Texas; New Ulm Broadcasting Company; and Roy E. Henderson ("Joint Motion").

<sup>8</sup> Withdrawal of Petition for Partial Reconsideration or, in the Alternative, Clarification filed February 13, 2004, by Marathon Media Group, LLC.

<sup>9</sup> Joint Motion for Leave to File Update to Joint Motion for Expedited Commission Action and Stay of Further Staff Action and Update to Joint Motion for Expedited Commission Action and Stay of Further Staff Action filed March 4, 2004, by Garwood Broadcasting Company of Texas; New Ulm Broadcasting Company; and Roy E. Henderson ("Joint Motion Update").

<sup>10</sup> Supplement filed March 25, 2004, by Fort Bend Broadcasting Company.

<sup>11</sup> Motion for Leave to File Request for Clarification and Request for Clarification filed March 26, 2004, by Marathon Media Group, LLC ("Request for Clarification").

<sup>12</sup> Pacific notes that it incorporates by reference petitioners' arguments concerning "backfill" allotment procedures. See Pacific Petition at n.2.

<sup>13</sup> Previously, Channel 263A had been allotted at Refugio, based on a proposal by *WAB Broadcasting, Refugio, Texas*, 14 FCC Rcd 3922 (MMB 1999).

<sup>14</sup> *Refugio and Taft, Texas*, 14 FCC Rcd 11609 (MMB 1999) ("*NPRM*"). Pacific filed its Petition for Rule Making in accordance with 47 C.F.R. §1.420(i), which allows FM licensees to request a new community of license in a rule making proceeding. See *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part and denied in part*, 5 FCC Rcd 7094 (1990) ("*Community of License MO&O*").

specifically stated that the public has a legitimate expectation that existing service will continue, and that this expectation is a factor to be weighed independently against the service benefits that may result from reallocating a channel. Having weighed the factors, the staff granted Pacific's reallocation request because it would result in a first local transmission service to both Taft and Refugio. However, the staff also stated that it was "compelled" to condition the reallocation of Channel 293C2 to Taft on activation of a channel at Refugio to insure continued service at Refugio.<sup>15</sup>

4. Pacific did not seek reconsideration or review of the *Refugio R&O*. Pacific subsequently filed an application proposing operation of KTKY-FM on Channel 293C2 at Taft, Texas, with an increase in effective radiated power to 50 kilowatts, an increase in antenna height above average terrain to 136 meters, and relocation of the transmitter. The Bureau issued Pacific a construction permit on November 2, 2000 (the "Taft Construction Permit").<sup>16</sup> Consistent with the *Refugio R&O*, the Taft Construction Permit bore the following special operating condition:

Operation of Station KTKY on Channel 293C2 in Taft, Texas, including program test operation pursuant to Section 73.1620, will not be commenced until such time as express authorization from the Commission has been granted. Such authorization will not be granted until a construction permit has been issued for Channel 263A or Channel 291A at Refugio, Texas, and activation of service has been initiated on Channel 263A or Channel 291A at Refugio.

Pacific did not reject this grant as conditioned,<sup>17</sup> nor did it seek reconsideration or review of the staff action.

5. On February 16, 2001, less than four months after issuance of the Taft Construction Permit, Pacific requested STA to operate KTKY-FM with the facilities specified in that authorization. It stated that it had lost the lease on its Refugio tower site and was unable to negotiate with the site lessor for an extension or a new lease.<sup>18</sup> On March 12, 2001, Pacific ceased operation of KTKY-FM, and on March 23, 2001, Pacific requested STA to remove the special operating condition in the now-final Taft Construction Permit and proposed to operate with the newly constructed Taft facilities.<sup>19</sup> Pacific claimed it was unable to find a viable alternate site that would allow continued operation from Refugio. On April 13, 2001, the Bureau denied both STA requests.<sup>20</sup> Pacific filed a petition for reconsideration on May 14, 2001, which the Bureau denied on December 21, 2001. Pacific timely filed its application for review on January 22, 2002. On February 11, 2003, the Commission denied review and affirmed the staff's denial of both STA requests. On that date, the Commission also directed the Bureau to cease its former practice of relying on vacant "backfill" allotments to preserve local service as a basis for

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<sup>15</sup> *Refugio and Taft, Texas* 15 FCC Rcd 8497, 8499-8500 (MMB 2000) ("*Refugio R&O*").

<sup>16</sup> File No. BPH-20000613AAF.

<sup>17</sup> See 47 C.F.R. § 1.110.

<sup>18</sup> See February STA Request.

<sup>19</sup> See March STA Request.

<sup>20</sup> Letter to James Withers, *Pacific Broadcasting of Missouri, LLC* (MMB Apr. 13, 2001).

permitting community of license changes by existing stations.<sup>21</sup> It held that a rulemaking petitioner may rely on a backfill allotment only when the backfill involves a currently licensed and operating station, and when the backfill reallocation itself complies with local service floor requirements; that is, the level of broadcast service that must be maintained subsequent to any deletion or reduction in facilities.

6. Pacific timely filed a petition for reconsideration of the Commission decision on March 13, 2003. On that same date, Marathon and Joint Petitioners filed petitions for reconsideration of the Commission's policy on "backfill" policy announced in the *Order*. On June 25, 2003, Joint Petitioners filed a motion for expedited consideration of their March 13, 2003 petition and for a stay of further staff action. On October 10, 2003, Pacific requested STA to operate with temporary facilities at Refugio. The staff granted this request on October 21, 2003. On February 11, 2004, Pacific requested STA to operate from a different temporary site at Refugio.<sup>22</sup> The staff granted this request on February 17, 2004.

7. **Discussion.** *Pacific's Petition for Reconsideration.* The standards for reconsideration of Commission denial of an application for review are narrow.<sup>23</sup> The Commission will only entertain a petition for reconsideration when the petition relies on facts which: (1) relate to events that have occurred or circumstances which have changed since the last opportunity to present such matters; or (2) were unknown to the petitioner until after his last opportunity to present such matters, which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.<sup>24</sup> Pacific claims, pursuant to Section 1.106(b)(2)(i), that it has standing to file its petition for reconsideration because it does present a "new set of facts and circumstances."

8. We disagree. First, Pacific contends that the impending future auction of more than 500 new FM allotments is a new fact providing sufficient justification for the Commission to reconsider its unfavorable earlier decision on Pacific's STA request.<sup>25</sup> However, Pacific's purported new fact is both incorrect and immaterial. Postponed Auction No. 37 is now scheduled for the Fall of this year. However, it is simply not the case, as Pacific asserts, that a backfill permittee is likely to initiate service in the near future. Moreover, even if Auction No. 37 is held this Summer, the earliest the Bureau could issue a new construction permit for Refugio would be 2005. Such a permit would specify a 2008 construction

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<sup>21</sup> See *Order*, 18 FCC Rcd 2296 ("Backfill allotments permit the filing of inherently contingent proposals, and create the potential for the type of problems and resource burdens that led to the codification of the Commission's general prohibition on filing contingent applications"). See also n.6, *supra*. See, e.g., 47 C.F.R. § 73.3517.

<sup>22</sup> Pacific states that it was unable to construct STA facilities at the Refugio site Pacific proposed October 10, 2003, due to denial of permission "by the hospital governing board at the proposed site."

<sup>23</sup> See *State of Oregon*, 15 FCC Rcd 24039 (2000).

<sup>24</sup> 47 C.F.R. § 1.106(b)(2)(i)-(ii).

<sup>25</sup> The Commission postponed Broadcast Auction No. 37, originally scheduled for February 21, 2001 (see *Public Notice*, "FM Broadcast Auction Scheduled for February 21, 2001," 15 FCC Rcd 18081 (WTB/MMB 2000)) in which one of the Refugio allocations is to be auctioned and for which Pacific has promised to bid. The auction was postponed indefinitely (see *Public Notice*, "FM Auction No. 37 Postponed," 16 FCC Rcd 16479 (WTB/MMB 2001)), largely due to uncertainty created by the decision of the United States Court of Appeals for the D.C. Circuit in *National Public Radio v. F.C.C.*, 254 F.3d 226 (D.C. Cir. 2001). In response to the D.C. Circuit opinion, the Commission released a *Second Report and Order* on April 10, 2003, establishing the Commission's new policies for licensing spectrum that the Commission has not reserved for the exclusive use of broadcast stations that provide or intend to provide noncommercial educational service (see *In the Matter of Reexamination of the Comparative Standard For Noncommercial Educational Applicants*, 18 FCC Rcd 6691 (2003)). However, a date for Broadcast Auction No. 37 has not been set.

deadline.<sup>26</sup> This estimate assumes no technical or legal challenges or problems, matters not fully within Pacific's control. In fact, the Commission's experience with Auction No. 84, involving new and major change AM station applications, shows that litigation arising out of the process is possible. Further, we cannot assume – as Pacific speculatively claims – that Pacific would have prevailed at the auction and immediately would have constructed the replacement Refugio facilities. In fact, Pacific recognized the delays inherent in the licensing process when it opposed the very condition at issue here, based on the possibility of delays in the competitive bidding process. Pacific's claim that the issuance of a construction permit and construction of a station at Refugio on Channel 263 can be "accomplished in a relatively short time" due to the "impending release of the auction rules," has no basis in fact.<sup>27</sup>

9. Second, Pacific contends that it has provided material details of its efforts to find a new site in Refugio. Pacific states that submission of its March 2003 status report reinforces its claim that a viable site is not available in Refugio.<sup>28</sup> Again, we disagree. In responding to the loss of a licensed site, the critical task is not the construction of equivalent or maximum facilities. Thus, the issue is not, as Pacific assumes, whether the reconstruction of its former facilities is feasible or prudent.<sup>29</sup> In contrast to the restrictive conditions Pacific has imposed in evaluating its alternatives, the Bureau has traditionally allowed licensees great flexibility in operating from temporary facilities.<sup>30</sup> Pacific's March 2003 status report, in fact, demonstrates that there are possible solutions to Pacific's temporary siting problem. Indeed, on October 10, 2003, and February 11, 2004, Pacific requested STA for operation from temporary facilities at Refugio, and the staff has granted these requests. We continue to believe that the STA is a preferable solution to the loss of service to over 70,000 KTKY-FM listeners while the station remained silent.

10. Despite the grant of Pacific's STA requests, Pacific continues to argue for an operation from the Taft site which it asserts would provide service to 300,000 other listeners, including 60 dBu service to all but 1,000 current Refugio listeners.<sup>31</sup> We have already concluded that this proposed STA operation from Taft would not provide acceptable service to KTKY-FM's current community of license. Operation from the Taft site would not provide principal community coverage (70 dBu) to any part of Refugio. Thus, not only would Refugio be deprived of a local transmission service, but its reception service would be significantly degraded. The community of Refugio "has a legitimate expectation that existing [local] service will continue,"<sup>32</sup> and this expectation is not met by Pacific's proposed STA operation from Taft.<sup>33</sup>

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<sup>26</sup> 47 C.F.R. § 73.3598.

<sup>27</sup> Pacific Petition at 4.

<sup>28</sup> This claim is undercut by Pacific's finding of a Refugio site as outlined in its February 11, 2004, STA request.

<sup>29</sup> Pacific Petition at 5 (alleging expense, impracticality of construction, and economic viability of any Refugio site).

<sup>30</sup> See, e.g., *Letter to Brad C. Deutsch, Esq.* (MB Apr. 19, 2002) (approving STA operation with "a single-bay emergency antenna on a short tower near the studio building"); *Letter to Kenneth C. Howard, Jr., Esq.* (MMB Nov. 29, 2000) (STA operation from a temporary location on a rooftop); *Letter to Dennis P. Corbett, Esq.* (MMB June 17, 1999) (temporary operation with emergency antenna mounted on a telephone pole).

<sup>31</sup> Pacific Petition at 7.

<sup>32</sup> *Community of License MO&O*, 5 FCC Rcd at 7097.

<sup>33</sup> See, e.g., *Caldwell, College Station, and Gause, Texas*, 13 FCC Rcd 13772, 13776 (1998) ("We do not believe the public interest is best served by allowing the only broadcast station assigned to Caldwell to provide the requisite 70 dBu signal to less than the entire community of license.").

In contrast, the recently granted February 17, 2004, STA request for operation from temporary facilities at Refugio continues to provide service to the licensed community and maintains, as closely as practicable, the licensed service area without extending it.<sup>34</sup> Pacific has, therefore, provided no new arguments or evidence that persuades us to alter our initial conclusion in this regard.

11. Pacific also faults the Commission for not making “a case specific decision to waive its rules under the unique circumstances of this case.”<sup>35</sup> Indeed, the Commission may waive any provision of its rules on its own motion and for good cause shown.<sup>36</sup> We conclude that special circumstances do not exist to justify a waiver on our own motion in this case, even if we were to deem the instant filing to be a waiver request. The remainder of Pacific’s petition repeats arguments previously presented and considered by the Commission.<sup>37</sup> We find that these arguments do not warrant further consideration.<sup>38</sup> It is well established that “rehearing will not be granted merely for the purpose of debating matters on which the tribunal has once deliberated and spoken.”<sup>39</sup>

12. *Marathon/Joint Petitioners Petitions for Partial Reconsideration and Clarification.*<sup>40</sup> Marathon and Joint Petitioners, pursuant to Section 1.106(b)(1), claim standing to petition the Commission’s decision on “backfill” policy due to petitioners’ pending applications to relocate their stations.<sup>41</sup> We agree. Therefore, we will consider all petitioners’ requests regarding our “backfill” policy. Marathon contends that our new “no backfill” rule modifies a rule that the Commission adopted by notice and comment rulemaking, and agencies are not free to modify rules promulgated in that manner without invoking rulemaking procedures.<sup>42</sup>

13. Section 553 of the Administrative Procedure Act (“APA”) describes the procedures agencies must follow when required to notify all potentially interested parties before adoption of any proposed new rule and permit them to submit comments. However, the Commission has broad authority under the APA

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<sup>34</sup> See *Letter to James Withers* (MB Oct. 21, 2003) (For commercial FM – 3.16mV/m with 1.0 mV/m contour).

<sup>35</sup> Pacific Petition at 7.

<sup>36</sup> 47 C.F.R. § 1.3.

<sup>37</sup> For instance, Pacific argues that the public interest would be served by deleting the condition specified in both the Taft allocation and construction permit in order to permit STA operations from the Taft site; that the Taft facilities would cover a greater population, noting that all but approximately 1,000 of the listeners served by KTKY(FM)’s Refugio facilities would receive a 60 dBμ-strength signal; and that the public is better served by allowing it to use its Taft facilities rather than remaining silent.

<sup>38</sup> See *In re Application of Matt Phillips, Joel Kay and Beverly Lockridge d/b/a FM 104.9 Broadcasting*, 9 FCC Rcd 1932 (1994).

<sup>39</sup> *WWIZ, Inc.*, 37 FCC 685, 686 ¶ 2 (1965), *aff’d sub.nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).

<sup>40</sup> Although Marathon has requested withdrawal of its petition, we take this opportunity to address certain issues raised in its pleadings.

<sup>41</sup> 47 C.F.R. § 1.106(b)(1) (“[A]ny party . . . whose interests are adversely affected by any action taken by the Commission . . . may file a petition for reconsideration. . .”).

<sup>42</sup> Marathon Petition at 4.

to fashion policies through rulemaking or *ad hoc* adjudication.<sup>43</sup> In the *Order*, the Commission modified the backfill policy. The prior staff practice, however, was never codified as part of the Commission's rules, nor has it been adopted through notice and comment rulemaking procedures. Rather, it was developed through case-by-case adjudications. Consequently the Commission retains the authority to change this policy through adjudications based on its determination as to whether the policy continues to be consistent with the public interest.<sup>44</sup>

14. In the *Community of License Memorandum Opinion and Order*, the Commission merely mentions backfill allotments as a "factor to be considered" in reviewing city of license modification proposals.<sup>45</sup> Importantly, the Commission explicitly rejected an approach that would routinely permit the use of vacant allotments to "preserve" local service. It held at the time that a vacant allotment "does not adequately cure the disruption to existing service occasioned by removal of an operating station. From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station. . . ."<sup>46</sup> Since that pronouncement, the Commission has adopted new rules that allow permittees twice as long – 36 months -- to complete construction. Moreover, the Commission has developed new rules for the award of commercial and NCE broadcast authorizations.<sup>47</sup> In these new circumstances, the licensing of vacant allotments is too remote and too contingent to justify the filing of move-out proposals premised on such replacement services. As this case illustrates, this practice can burden Commission resources and lead to spectrum entanglements. We again conclude, therefore, that the better policy is to accept rulemaking proposals requesting a change in the community of license of the sole local service licensed to a community only upon the initiation of broadcast operations by a replacement service.<sup>48</sup>

15. Marathon and Joint Petitioners also argue that if the Commission rejects petitioners' request to modify the policy,<sup>49</sup> it nevertheless should not apply the revised policy to proposals on file before the change became effective.<sup>50</sup> Marathon specifically contends that the Commission does not ordinarily have

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<sup>43</sup> See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); see also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *Chisholm v. FCC*, 538 F.2d 349, 364-366 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976); *South Central Bell Telephone Company v. Louisiana Public Service Commission*, 744 F.2d 1107, 1118 (5th Cir. 1984); *Southern Bell Tel. and Tel. v. FCC*, 781 F.2d 209, 216 n. 8 (D.C. Cir. 1986); *Turro v. FCC*, 859 F.2d 1498 (D.C. Cir. 1988); *Atochem N. Am., Inc. v. U.S. EPA*, 759 F. Supp. 861 (D.D.C. 1991).

<sup>44</sup> See *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976).

<sup>45</sup> *Community of License MO&O*, 5 FCC Rcd at 7097.

<sup>46</sup> *Id.*

<sup>47</sup> See *In the Matter of Reexamination of the Comparative Standard For Noncommercial Educational Applicants*, 18 FCC Rcd 6691 (2003).

<sup>48</sup> In its March 26, 2004, Request for Clarification, Marathon tries to distinguish the practice of allotting backfill allotments to avoid the loss of a community's sole local transmission service from the practice of allotting backfill allotments "to replace [the loss of existing] service to unserved or underserved areas." We note that we need not reach this issue in resolving the present appeal. We will, therefore, deny Marathon's Request for Clarification. The Commission will consider Marathon's arguments in the context of its specific application.

<sup>49</sup> See Joint Petitioners Petition at 5-8.

<sup>50</sup> Marathon Petition at 6; Joint Petitioners Petition at 3.

the ability to reverse existing law and apply the new law retroactively to pending cases of other parties.<sup>51</sup> As noted previously, the *Order* at issue here merely changed a processing policy, and the Commission clearly has the authority to cease application of a policy – even in pending cases – when it has found that policy to be contrary to the public interest.<sup>52</sup> Contrary to Marathon’s contention, a change in Commission policy that upsets an expectation that current rules and policies would continue does not constitute unlawful retroactive rule making.<sup>53</sup> Additionally, the Supreme Court has made clear that pending applications may be dismissed based on changed processing rules.<sup>54</sup> Here, we have determined that the public interest is best served by modifying our “backfill” policy in resolving all pending change of community of license rulemaking proposals; we therefore reject petitioners’ contention that we may not apply the new policy to pending proposals.<sup>55</sup>

16. Finally, Joint Petitioners submit that if the new backfill policy is retained, the Commission should accord special consideration to parties seeking waiver of the application of the new policy to their pending cases.<sup>56</sup> Specifically, Joint Petitioners note that the June 11, 2003 *Public Notice* listing counterproposals to be considered in MB Docket No. 02-248<sup>57</sup> omitted New Ulm Broadcasting Company’s (“New Ulm”) counterproposal to provide a first local transmission service to Schulenberg, Texas, because the counterproposal is inconsistent with the new backfill policy.<sup>58</sup>

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<sup>51</sup> Marathon Petition at 6.

<sup>52</sup> *Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981) (where an agency, in an intervening proceeding, has determined that a policy previously applied no longer serves the public interest, convenience, and necessity, and therefore would not be applied henceforth, the agency on remand of action cannot be required to apply a policy it has rejected); *see also See Report and Order in Docket 82-320*, 93 F.C.C. 2d 436, 457-58 (1983), *recon. denied*, 56 R.R.2d 835 (1984), *aff’d sub nom. Beaufort County Broadcasting Company v. FCC*, 787 F.2d 645 (D.C. Cir. 1986) (application of new policies to pending cases did not violate the rights of the applicants).

<sup>53</sup> *Landgraf v. USI Film Products*, 511 U.S. 244, 269 & n. 24 (1994) (a law does not act retrospectively merely because it is applied in a case arising from conduct antedating its enactment or upsets expectations based in prior law; rather, the issue is whether the new provision attaches new legal consequences to events completed before its enactment); *DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (“[A] new rule or law is not retroactive ‘merely because it . . . upsets expectations based on prior law,’” quoting *Landgraf*); *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) (“[I]t is often the case that a business will undertake a certain course of conduct based on the current law and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking . . .”).

<sup>54</sup> *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956). Indeed, an agency may even apply new or modified rules to pending applicants. *See, e.g., Community Television, Inc. v. FCC*, 216 F.3d 1133, 1143 (D.C. Cir. 2000); *Chadmore Communications, Inc. v. FCC*, 113 F.3d 235, 240-241 (D.C. Cir. 1997).

<sup>55</sup> *See Barnwell, South Carolina, et al.*, 18 FCC Rcd 15152, 15154 (MB 2003).

<sup>56</sup> Joint Petitioners Petition at 11, citing *Storer, supra*, and 47 C.F.R. § 1.3.

<sup>57</sup> *Consumer and Governmental Affairs Bureau Reference Information Center Petition for Rule Making Filed, Public Notice*, Report No. 2069 (rel. June 11, 2003).

<sup>58</sup> Joint Motion at 3.



17. Any applicant may, of course, make a written request for waiver of any Commission rule.<sup>59</sup> The staff may grant a waiver of its rules where the particular facts make strict compliance inconsistent with the public interest if applied to petitioner and when the relief requested would not undermine the policy objective of the rule in question.<sup>60</sup> Moreover, the processing staff must give any waiver request the requisite “hard look” required by the federal courts.<sup>61</sup> In this regard, the Commission has determined that there may be “rare circumstances where removal of a [sole] local service might serve the public interest. . . .”<sup>62</sup> We reject the argument that the pendency of a backfill proposal at the release of the *Order* is such a circumstance. In this case, our core commitment to retaining a community’s sole local service must prevail over the desire of certain broadcasters to effect station improvements based on an interpretation of our Section 307(b) mandate that we believe no longer serves the public interest. We direct the staff to dismiss in the ordinary course those rulemaking petitions, notices of proposed rulemaking and counterproposals that rely solely on a vacant allotment to replace a community’s sole local transmission service. Neither the Joint Petitioners nor any other party requires approval from the Commission to file a request for waiver of the revised backfill policy in broadcast allotment proceedings or to seek review of the return of a proposal because it fails to preserve a community’s sole local service. These matters are most appropriately considered in the context of the particular allocation proceeding.<sup>63</sup> Accordingly, we decline Joint Petitioner New Ulm’s request to require the staff to consider the Schulenberg counterproposal in MB Docket 02-248.

**18. Conclusion.** IT IS ORDERED that Pacific’s Petition for Reconsideration IS DENIED. IT IS FURTHER ORDERED, that the Petition for Partial Reconsideration or Clarification filed by Marathon Media Group, LLC, and subsequently withdrawn, IS DISMISSED, and the Joint Petition for Reconsideration and Clarification filed by New Ulm Broadcasting Co., Garwood Broadcasting Co., and Roy E. Henderson IS DENIED. Finally, in light of our action here, Marathon Media Group, LLC’s Request for Clarification IS DENIED, and New Ulm Broadcasting Co.’s, Garwood Broadcasting Co.’s, and Roy E. Henderson’s Joint Motion and Update to Joint Motion for Expedited Action and Stay of Further Staff Action and Fort Bend Broadcasting Company’s Supplement ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>59</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *aff’d*, 459 F.2d 1203 (1972) *cert. denied*, 409 U.S. 1027 (1972) citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968); *Birach Broadcasting Corporation*, 18 FCC Rcd 1414 (2003); *Family Stations, Inc. v. DirecTV, Inc.*, 17 FCC Rcd 25333 ¶ 7 (2002).

<sup>60</sup> *Id.*; see also *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>61</sup> See *WAIT Radio*, *supra*.

<sup>62</sup> *Community of License MO&O*, 5 FCC Rcd at 7096.

<sup>63</sup> In its March 25, 2004, Supplement, Fort Bend states that it has filed a Petition for Partial Reconsideration in MB Docket No. 02-335 challenging only the “retroactive” application of the policy set forth in the *Order*. The Commission will consider Fort Bend’s arguments in MB Docket No. 02-335. We will, therefore, dismiss Fort Bend’s Supplement.